DOCKET NO. CV 18 6044479

JOE MARKLEY
& ROB SAMPSON : SUPERIOR COURT

v. : JUDICIAL DISTRICT OF NEW BRITAIN

STATE ELECTIONS
ENFORCEMENT COMMISSION : FEBRUARY 24, 2022

MEMORANDUM OF DECISION

The plaintiffs, candidates for election to the Connecticut General Assembly in 2014, applied for and accepted public funding for their campaigns under the Citizens Election Program (program). General Statutes §§ 9-700 to 9-716, inclusive. In order to obtain that funding they each swore an oath that their candidate committees "will expend any moneys received from the Citizens' Election Fund in accordance with the provisions of Conn. Gen. Stat. § 9-607(g), as amended, and with any regulations adopted by the State Elections Enforcement Commission ("SEEC") under Conn. Gen. Stat. § 9-706(e)," and that they understood that they were "required to comply with the requirements of the Program, including all applicable statutes, regulations and declaratory rulings [of the SEEC]." Record, pp. 148-49 (Markley); pp. 235-237 (Sampson).

Electronic notice sent to all counsel of record and to Official Reporter. A. Jordanopoulos, 2/24/22 Ct. Officer

In 2018 the defendant state elections enforcement commission (commission) found that plaintiffs had violated various of the campaign finance statutes and regulations and imposed civil penalties on them.

The issue raised by this appeal from the commission's actions is whether the plaintiffs' First Amendment rights were unconstitutionally restricted by the expenditure limitations imposed as conditions of their receipt of public campaign funding. This court concludes that they were not.

I

Plaintiff Joe Markley was a candidate for election as a state senator in 2014; plaintiff Rob Sampson, for election as a member of the state house of representatives. Each had established a candidate committee to "aid or promote such candidate's candidacy alone for a particular public office . . . ." General Statues § 9-601 (4). These committees were qualified to and did receive grants from the citizens' election fund (fund) under General Statues § 9-706.[1] See General Statues § 9-700 (12).

Among the restrictions on campaign spending imposed on the plaintiffs were the following. General Statutes § 9-607 (g)

[1] Mr. Markley received $56,814.00 (Record, p. 163); Mr. Sampson, $27,850.00 (Record, p. 337).

limited "permissible expenditures" of a candidate committee to those for the purpose of "the promoting of the nomination or election of the candidate who established the committee . . . ." General Statutes § 9-616 (a)(5) prohibited contributions by a candidate committee "to, or for the benefit of, . . . another candidate committee except that . . . a pro rata sharing of certain expenses in accordance with subsection (b) of section 9-610 shall be permitted . . . ." And, a "contribution" is defined broadly to include "(a)ny gift, subscription, loan, advance, payment or deposit of money or anything of value, made to promote the success or defeat of any candidate seeking the nomination for election, or election . . . ." General Statutes § 9-601a (a)(1).

In addition to these statutory limitations on expenditures by candidate committees, a regulation adopted by the commission[2] prescribed that "(a)ll funds in the depository account of the participating candidate's qualified candidate committee, including grants and other matching funds distributed from the [fund], qualifying contributions and personal funds, shall be used only

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[2] General Statues § 9-706 (e) required the commission to "adopt regulations . . . on permissible expenditures under subsection (g) of section 9-607 for qualified candidate committees receiving grants from the fund under sections 9-700 to 9-716, inclusive."

for campaign-related expenditures made to directly further the participating candidate's . . . election to the office specified in the participating candidate's affidavit certifying the candidate's intent to abide by [the program's] requirements." Regs., Conn. State Agencies § 9-706-1. Another commission-adopted regulation prohibited candidates participating in the fund from spending funds in their depository accounts for "contributions, loans or expenditures to or for the benefit of another candidate, political committee or party committee . . . ." Regs., Conn. State Agencies § 9-706-2 (b)(8).

Finally, because "contributions" by a candidate committee are at the same time "expenditures" of that committee, the broad statutory definition of "expenditures" by candidate committees is important in determining whether there has been a violation of the relevant statutes and regulations: "(1) (a)ny purchase, payment, distribution, loan, advance, deposit or gift of money or anything of value, when made to promote the success or defeat of any candidate seeking the nomination for election or election . . ." [and] "(2) (a)ny communication that (A) refers to one or more clearly identified candidates, and (B) . . . appears in a

newspaper, magazine or on a billboard, or is sent by mail . . . ." General Statute § 9-601b (a)(1) & (2).

In the course of their election campaigns Messrs. Markley and Sampson published, in the form of postcards, flyers and a newspaper advertisement, five pieces of campaign literature that became the subjects of a complaint to the commission, alleging that they violated these statutory and regulatory provisions.[3] Two examples of these publications illustrate the allegedly violative content. A large-size postcard, paid for jointly by the Markley and Sampson candidate committees, contained the following language: "Rob and Joe have consistently fought Governor Malloy's reckless spending and voted against his budget which resulted in nearly $4 Billion in new and increased taxes for Connecticut residents. Rob and Joe have consistently fought Governor Malloy's agenda and have tried to restore Common Sense and fiscal responsibility in state government." Record, p. 566. Another over-sized postcard, paid for by the Sampson candidate committee, said, "Rob

[3] The complaint identified six pieces of campaign literature as violative of the campaign finance statutes and regulations. The commission found that one of those, a letter jointly paid for by the Markley and Sampson candidate committees that contained no mention of Governor Malloy, did not run afoul of those prohibitions and dismissed the complaint as to that letter. Record, pp. 566, 571.

Sampson wants a New Direction and rejects Governor Malloy's policies. It's time to change course and STOP Governor Malloy and the majority Democrat's dangerous agenda." Record, p. 567. Common to these and the other communications is the explicit negative comments about Governor Malloy, the Democratic candidate for governor in 2014.

The commission treated the complaint as a contested case and heard evidence and argument from the parties on August 31, 2017. It found that the publication of these communications, which "clearly identified a candidate from another race (Governor Malloy)"; Record, p. 571; and consistently portrayed him in a negative light; Id.; opposed Governor Malloy and constituted "expenditures" in a race other than the candidates' own races, i.e., the race for Governor. As such, they were prohibited by General Statutes §§ 9-607 & 9-616 and Regs., Conn. State Agencies § 9-706-1 & 9-706-2.[4]

The commission explicitly rejected the plaintiffs' argument that these communications were solely concerned with their own

[4] The commission also found that these communications violated General Statutes § 9-601b & 9-706. The former is merely a definitional statute without any language of prohibition; the latter simply sets forth the application procedures for program grants. Neither can be the basis for finding a violation of the campaign financing statutes.

races, portraying them as checks on executive authority, and not the gubernatorial race. Record, p. 570. It laid particular stress on the plaintiffs' sworn certifications that, in return for grants of public campaign funds, they would adhere to all expenditure limitations, both those applicable to all candidates, whether participating in the program or not; such as §§ 9-607 & 9-616; and those more restrictive rules for participating candidates; Regs. 9-706-1 & 9-706-2. Record, p. 571.

Mr. Markley was found by the commission to have two instances of impermissible expenditures; Mr. Sampson, five such instances. Pursuant to its statutory authorization to impose financial penalties on participating candidates,[5] the commission levied a civil penalty on Mr. Markley of $2,000.00 and on Mr. Sampson of $5,000.00.

This appeal followed, pursuant to General Statutes § 4-183. This court originally dismissed the appeal as untimely, under § 4-183 (b). See docket entry #113. The Supreme Court, however, reversed that judgment and remanded the case for consideration of the merits of the appeal. See docket entry #117; *Markley* v. *State Elections Enforcement Commission*, 339 Conn. 96 (2021).

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[5] General Statutes § 9-7b (a)(2)(D).

II

A

The plaintiffs' argument is summed up in one sentence in their opening brief: "The [commission's] decision and the statutes and regulations it is based on . . . violate the First Amendment by restricting a candidate's ability to speak about other, non-opposing candidates." Plaintiff's Opening Brief, pp. 1-2 (docket entry #127, Aug. 30, 2021)(opening brief). The argument begins with an absolutist position: the "First Amendment prohibits limits on campaign speech." Id., p. 2. "Even if Plaintiffs' communications were not specially protected as candidate speech," however, the statutes and regulations on which the commission relied in penalizing the plaintiffs, cannot survive the strict scrutiny required for limitations on political speech. Id., pp. 9-15.

Connecticut cannot assert a compelling state interest to justify its restrictions on candidate speech, the plaintiffs contend. Id., pp. 15-21. The only "compelling interest" recognized as a justification for restrictions on a candidate's First Amendment rights is the prevention of corruption or the appearance of corruption. Connecticut's speech restrictions are not narrowly tailored, as they must be, to advance that anti-corruption

interest. And, in this case the commission has failed even to allege any coordination between the Markley and Sampson campaigns and the Malloy campaign, a necessary prerequisite for demonstrating a risk of actual or apparent *quid pro quo* corruption. Id., pp. 17-19.

Inserted into their discussion of the constitutional limitations on regulating campaign speech, in an almost by-the-way fashion, the plaintiffs argue, seemingly apart from their other constitutional arguments, that their "communications cannot be regulated as independent expenditures"; i.e., "political speech presented to the electorate that is not coordinated with a candidate." *Citizens United* v. *Federal Election Commission*, 558 U.S. 310, 360 (2010). Id., pp. 20-21. The commission noted that the plaintiffs' communications were not coordinated with any other candidate committee, including that of the governor; Record, p. 571; so, they seem to meet the definition of "independent expenditures."

To be subject to government regulation, the plaintiffs assert, such communications must be either ones of express advocacy to vote against Governor Malloy or vote for his opponent; *Buckley* v. *Valeo*, 424 U.S. 1, 44 n. 52 (1976); or the "functional

equivalent of express advocacy"; *Federal Election Comm.* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449, 469 (2007)(WRTL); that is, "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." Id., 469-70. Plaintiffs' communications at issue here were neither, they claim.

At the same time as they recognize that the Supreme Court has held that "laws targeting speech that 'promotes' or 'opposes' a candidate are not unconstitutionally vague"; *McConnell* v. *Fed. Election Comm.*, 540 U.S. 93, 170 n. 64 (2003); plaintiffs nevertheless argue that the Connecticut statutes regulating speech that "promotes" a candidate are unconstitutionally vague; Opening Brief, pp. 22-23; because the commission employs a "standardless definition of promoting or opposing a candidate, one that can be used to regulate any speech that merely mentions a candidate." Id., p. 23.

According to the plaintiffs, Connecticut's statutes prohibit "any mention of the Governor's policies by candidates who are members of the legislature." Id. In so doing they restrict the role of the legislature in regard to the executive branch and

violate the state constitution's separation of powers provisions. Id., p. 24.

Finally, the plaintiffs address what the court considers the heart of this case; namely, whether spending restrictions imposed by the program on participating candidates constitute unconstitutional conditions on their receipt of program funds.

Connecticut, by statute and commission-adopted regulations, forces candidates to choose between receiving program funds and their right to share their views on the election of other candidates, the plaintiffs maintain. Opening Brief, p. 24. Not only can they not use program funds to advocate for or against a candidate in another race; they cannot use *any* funds in their committee depository for that purpose. Id., p. 25. This goes beyond the generally accepted state interest of controlling the use of public funds and renders the speech restrictions unconstitutional. Id., pp.25-26. Finally, requiring candidates to make otherwise-prohibited speech through independent affiliates, which will bear the cost of the speech, deprives candidates of the control over the message that would make it truly the candidate's own expression of his beliefs. Id., pp. 26-27.

B

The commission's position is summed up in its memorandum of law as follows: "(w)hen [candidates] elect to speak 'in' a 'candidate committee' that is paid for with public taxpayer funds, as these Plaintiffs did, they agree to 'directly' limit their speech to the topic of *their own election.*" (Emphasis original) Defendant's Memorandum of Law, p. 1 (Sept. 30, 2021)(defendant's memorandum). "These Plaintiffs . . . voluntarily chose to accept those public funds knowing that by doing so they were relinquishing core First Amendment rights." Id.

After reviewing the plaintiffs' political backgrounds and the history of their participation in the program, the commission emphasizes their agreement to abide by program rules that "required them to forego a wide range of otherwise permissible First Amendment conduct such as making unlimited expenditures, fundraising from certain sources, coordinating expenditures with certain individuals and committees and expending [program] funds in a way that goes beyond 'directly furthering' their own race" and their alleged violations of those rules by publishing material that clearly identified and opposed a candidate in another election; namely, Governor Malloy. Id., pp. 8-13.

The commission argues that Connecticut can lawfully prohibit candidates from making contributions to other candidates through their candidate committees. Id., pp. 16-19. More to the point, the commission maintains that the program's restrictions on First Amendment rights are not subject to strict or even heightened scrutiny, as argued by the plaintiffs, because public financing programs "further public discussion and participation in the electoral process." Id., p. 21. Moreover, the program's requirement that candidates spend program funds only to directly further their own candidacy would survive heightened scrutiny analysis. Id., pp. 22-26.

This is especially so, according to the commission, because the plaintiffs had available to them alternative ways of publishing the same sort of communications at issue here by sharing the expense with speakers or committees that could lawfully make communications opposing Governor Malloy, by avoiding reference to the governor by name or speaking through their own separate personal political committees, as long as program funds were not used. Id., p. 30.

The commission goes on to review authority supporting prohibitions on campaign expenditures as conditions on the receipt

of public financing. Id., pp. 26-29. As long as candidates, like the plaintiffs here, are free to choose not to participate in the program and, therefore, free to make expenditures without regard to the program's restrictions, they cannot claim that the conditions imposed by the program are unconstitutional. Id., p. 28.

Finally, the commission's memorandum addresses the plaintiff's challenges to the campaign expenditures and regulations as unconstitutionally vague and as intruding on the legislature's constitutional powers. Id., pp. 32-36.

III

The parties are at sword's point over the deference owed by this court to the commission's factual determination that the plaintiffs' communications opposed Governor Malloy's reelection. The commission believes that its interpretation of the communications is entitled to deference "and should only be overturned if it is clearly erroneous," i.e., not supported by the reliable, probative, and substantial evidence on the whole record. Defendant's Memorandum, p. 16. See § 4-183 (j)(5). Plaintiffs, on the other hand, argue that the court "must make an independent review of constitutional facts, or mixed questions of fact and constitu-

tional issues." Opening Brief, p. 6. The court agrees with the plaintiffs.

"(O)ur review of petitioners' claim that their activity is indeed in the nature of protected speech carries with it a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court. . . .The requirement of independent appellate review . . . is a rule of federal constitutional law . . . which generally requires us to review the finding of facts by a State court where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts . . . ." (Internal citations and quotation marks omitted.) *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 567 (1995). "(O)ur obligation is to make an independent examination of the whole record, so as to assure ourselves that this judgment does not constitute a forbidden intrusion on the field of free expression." (Internal quotation marks omitted.) Id., 567-68.

The court's "independent examination" of the five communications which the commission found to have violated the applicable statutes and regulations leads it to conclude that they were *both*

an exhortation to vote for Messrs. Markley and Sampson *and* the "functional equivalent of express advocacy" for the defeat of Governor Malloy. *WRTL*, supra, 551 U.S. 469. As far as the record reveals, the flyers and postcards were distributed only within the electoral districts in which they were candidates for office. They contained *express words of advocacy* to vote for the plaintiffs; e.g., exhibit two, the postcard referred to earlier in this memorandum,[6] in addition to the references to Governor Malloy referred specifically to "Joe and Rob" as being "who we need to turn Connecticut around! Right for Southington! Right for Connecticut!." Record, p. 73. The newspaper advertisement, in addition to its reference to "the many bad policies put forth by Gov. Malloy," urged voters to "Re-Elect Rob this November 4th!" Record, p. 82.

This conclusion leads the court to find, contrary to the commission's conclusion, that the funds spent on these communications were "permissible expenditures", having been made for the "promoting of the . . . election of the candidate who established the [candidate] committee." As such, they did not violate § 9-607 (g).

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[6] See p. 5.

At the same time, no literate reader of these communications could miss their not-so-subtle message not only to vote *for* "Joe and Rob" but also to vote *against* Governor Malloy, the author of the policies "Joe and Rob" had so consistently opposed. Insofar as the communications referred to the governor, they were "susceptible of no reasonable interpretation other than as an appeal to vote" against him. *WRTL*, supra, 551 U.S. 469-70.[7] As Mr. Sampson put it in exhibit four, the oversized postcard referred to earlier,[8] "It's time to . . . STOP Governor Malloy." (Capitals in original.)

As such, as the commission found, the communications constituted violations of § 9-616 (a)(5) and Regs. 9-706-1 (a) and 9-706-2 (b)(8). Section 9-616 (a)(5) prohibits a candidate committee from contributing "anything of value," such as the communications urging a vote against Governor Malloy's reelection, to or for the benefit of another candidate committee; namely, the

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[7] The court notes that the ads at issue in WRTL, which the Court found did not qualify as the "functional equivalent of express advocacy" for or against a specific candidate, unlike the plaintiffs' communications, were "issue ads" that did not "mention an election, candidacy, political party, or challenger, and they do not take a position on a candidate's character, qualifications or fitness for office." WRTL, supra, 551 U.s. 470.

[8] See pp. 5-6.

candidate committee of the governor's opponent.[9] Taken together the regulations in question operate only to circumscribe a candidate's use of the funds in the depository of his candidate committee. Regulation 9-706-1 (a) requires that all funds in the depository account be used *only* for the candidate's election to the office specified in the candidate's affidavit certifying his intent to abide by the [program's] requirement. Regulation 9-706-2 (b)(8) forbids candidates from using funds in the depository account for "contributions, loans or expenditures to or for the benefit of another candidate . . . ."

It remains to be determined whether that statute and those regulations unconstitutionally restricted plaintiffs' First Amendment rights. The plaintiffs must demonstrate the unconstitutionality of the statute and regulations beyond a reasonable doubt. "The party attacking a validly enacted statute . . . bears the heavy burden of proving its unconstitutionality beyond a reasonable doubt and we indulge in every presumption in favor of the statute's constitutionality. . . . We undertake this search for a constitutionally valid construction when confronted with

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[9] While the statute applies to all candidates, whether publicly or privately financed, it applies with special force to publicly financed candidates, who have sworn to abide by it as a condition of their receipt of taxpayer funds.

criminal statutes as well as civil statutes." *State* v. *Breton*, 212 Conn. 258, 269 (1989). See also *Town of Wethersfield* v. *PR Arrow, LLC*, 187 Conn. App. 604, 632 (2019).

IV

The fountainhead of constitutional analysis of campaign finance limitations is the now almost fifty-year-old decision of the United States Supreme Court, *Buckley* v. *Valeo*, 424 U.S. 1 (1976). There the Court considered a variety of challenges to the Federal Election Campaign Act (Act). The decision means many things to many people and is cited frequently by both the plaintiffs and the commission. Its statement of "general principles" resonates today:

> The Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people. . . . In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. . . . (I)t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.

(Internal citations and quotation marks omitted.) Id., 14.

The Court in *Buckley* upheld as constitutional the Act's limitations on political contributions and struck down its expenditure limitations. The former were found to "serve the basic governmental interest in safeguarding the integrity of the electoral process without directly impinging upon the rights of individual citizens and candidates to engage in political debate and discussion." Id., 58. "By contrast," the Court held that the expenditure ceilings set by the Act and its limitation on a candidate's expenditures from his own personal funds "place substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate." Id., 58-59.

Of particular relevance to this court's consideration of Connecticut's public financing scheme is the Court's treatment of the Act's provisions for public financing of Presidential election campaigns. Id., 85-108. First, in response to a First Amendment challenge to the Act's public financing provisions, the Court gave this full-throated endorsement of those provisions: "Although 'Congress shall make no law . . . abridging the freedom of speech

. . . ,' Subtitle H[10] is a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people. Thus, Subtitle H furthers, not abridges, pertinent First Amendment values." Id., 92-93.

Second, the Court explicitly recognized that candidates who accept public financing under the Act voluntarily accept ceilings on their expenditures. Id., 95. For example, for expenses in the general election campaign major-party candidates are entitled to $20,000,000.00,[11] but "(t)o be eligible for funds the candidate must pledge not to incur expenses in excess of [that amount] and not to accept private contributions except to the extent that the fund is insufficient to provide the full entitlement." Id., 88. So, while campaign expenditure limitations in general are constitutionally impermissible, they are allowable as part of a system of public financing of political campaigns.

At the end of the day the Court endorsed as constitutional the Act's public financing scheme, with its limitations on

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[10] Of the Internal Revenue Code of 1954, which contained the major provisions of the Act's public financing scheme.

[11] Adjusted for inflation.

permissible expenditures by candidates who accept public campaign funds. Id., 108. "Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forego private fundraising and accept public funding." Id., 57 n. 65.

"Since *Buckley* the circuit courts have generally held that public financing schemes are permissible if they do not effectively coerce candidates to participate in the scheme." *North Carolina Right to Life Committee Fund* v. *Leake*, 524 F.3d 427, 436 (4th Cir. 2008). See *Daggett* v. *Comm. on Governmental Ethics & Election Practices*, 205 F.3d 445, 466-72 (1st Cir. 2000); *Gable* v. *Patton*, 142 F.3d 940, 947-49 (6th Cir. 1998); *Rosenstiel* v. *Rodriguez*, 101 F.3d 1544, 1549-52 (8th Cir. 1996); *Vote Choice, Inc.* v. *DiStefano*, 4 F.3d 26, 38-39 (1st Cir. 1993); *Corren* v.*Condos*, 898 F.3d 209, 223 (2018).

The Second Circuit, sitting *en banc*, explicitly adopted the reasoning of a three-judge district court decision, rejecting a challenge by the Republican National Committee to the $20,000,000.00 cap on the expenditures of publicly funded

candidates for the presidency. *Republication Nat'l Comm.* v. *FEC*, 487 F.Supp. 280 (S.D.N.Y.)(*RNC II*), *aff'd mem.*, 445 U.S. 955 (1980); see also *Republican Nat'l Comm.* v. *FEC*, 616 F.2d 1, 2 (2d Cir.)(en banc) (1980), *aff'd mem.*, 445 U.S. 955 (1980). The district court in *RNC II* addressed a challenge mounted by the plaintiffs here; namely, that the legislature and the commission may not condition a candidate's eligibility for public funds upon the candidate's voluntary acceptance of limitations on campaign expenditures. 487 F.Supp. at 284. See *Perry* v. *Sinderman*, 408 U.S. 593, 597 (1972)("(T)he government . . . may not deny a benefit to a person on a basis that infringes his constitutionally protected interests - especially, his interest in freedom of speech."). "(W)hile Congress may not condition benefit on the sacrifice of protected rights, the fact that a statute requires an individual to choose between two methods of exercising the same constitutional right does not render the law invalid, provided the statute does not diminish a protected right. . . . (A)s long as the candidate remains free to engage in unlimited private funding and spending instead of limited public funding, the law does not violate the First Amendment rights of the candidate or supporters." Id., 284-85.

This court finds that rationale dispositive of the plaintiffs' reliance on the Supreme Court's unconditional conditions doctrine and notes that the plaintiffs have made no claim here that Connecticut's public financing scheme is coercive in any manner.

Indeed, the cases cited by plaintiffs as illustrative of the unconditional conditions doctrine support the constitutionality of a non-coercive public financing system like Connecticut's. For example, in *Rust* v. *Sullivan*, 500 U.S. 173 (1991), the petitioners claimed that their receipt of Title X funding was unconstitutionally conditioned on their relinquishment of "a constitutional right to engage in abortion advocacy and counseling." Id., 196. The Court rejected the challenge. "The Title X grantee can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds." Id., 196.

Similarly, the plaintiffs here were not restricted in their advocacy of a vote against Governor Malloy, except through the use of their candidate committee depositories, which included public funds. They complain that the program "prohibits grantees from

using *any* funds in their campaign accounts to make a communication that mentions a non-opposing candidate . . . ." (Emphasis original.) Opening Brief, p. 25. It is certainly true that these depositories include not just the public grant funds but also matching funds and qualifying contributions and may include personal funds of the candidate. Because these funds are commingled in the account, the prohibitions naturally apply to all such funds. Candidates can retain the unfettered right to make unlimited personal expenditures in support of or opposition to other candidates simply by depositing personal funds not in their candidate committee depository accounts but in other accounts under their control.

Plaintiffs were free to use their private funds, outside of their candidate committee depository, as well as other private contributions, to pay for advertisements and circulars attacking the governor. By requiring that plaintiffs fund their anti-Malloy activity outside of their candidate committee depositories, the legislature and the commission have not denied them the right to advocate against the governor's reelection. They have merely refused to fund such activities out of the public fisc. See also *Regan* v. *Taxation with Representation of Washington*, 461 U.S. 540,

546 (1983)(Internal Revenue Code's requirement that applicants for tax-exempt status refrain from lobbying activities does not violate First Amendment because those organizations, through use of a "dual structure", may continue their lobbying activities with separate funding.)

This is not to suggest that a public campaign financing program could not run afoul of the First Amendment by imposing overly restrictive conditions on recipients. For example, a scheme that not only limited the use of funds in the depository that contained public funds but also forbade use of the candidate's personal resources outside of the depository would seem to court a finding of unconstitutionality. *Buckley* v. *Valeo*, supra, 424 U.S. 58. But see *Davis* v. *Federal Election Comm.*, 554 U.S. 724, 739-740 (2008).

Finally, plaintiffs attempt to characterize the prohibitions on the use of candidate committee funds to promote the cause of a candidate other than the one who established the committee as "content-based" restrictions, i.e., "those that target speech based on its communicative content." *Reed* v. *Gilbert*, 576 U.S. 155, 163 (2015). Such laws are "presumptively unconstitutional and may be justified only if the government proves that they are

narrowly tailored to serve compelling state interests." Id. But, plaintiffs can still express support for or against other candidates through their own unlimited expenditures and any properly coordinated expenditures. So, in limiting their prohibition of such expenditures to the funds in the candidate committee's depository the statute and regulations in question have narrowly tailored the prohibition to serve the legitimate state interest in ensuring that public funds are spent only to serve the purpose for which they were granted in the first place; namely, to support the campaign of the candidate who requested them. See *Corren* v. *Corros*, supra, 898 F.3d at 226-27.

In sum, this court concludes that the voluntary decision by the plaintiffs to accept public funds along with the condition that they not be used to promote another candidate's election does not burden the plaintiffs' First Amendment rights.

V

The plaintiffs' First Amendment challenge to the statutes and regulations governing campaign financing raises very serious constitutional questions. Their vagueness and separation of powers arguments do not require extended discussion.

The only word challenged as "void for vagueness" in the entire regulatory scheme is "promote," as in, e.g., § 9-601a (a)(1) ("promote the success or defeat"). Opening Brief, p. 22. Plaintiffs candidly acknowledge that the Supreme Court has held that "in general, laws targeting speech that 'promotes' or 'opposes' a candidate are not unconstitutionally vague." Id., citing *McConnell* v. *Federal Election Comm.*, 540 U.S. 93, 170 n. 64 (2003). Here, however, the word is unconstitutionally vague, plaintiffs assert, because the commission "employs a standardless definition of promoting or opposing a candidate." Id., p. 23.

This argument, however, amounts to nothing more than a restatement of the plaintiffs' disagreement with the commission's interpretation of their communications. A word does not become unconstitutionally void for vagueness simply because parties may differ as to its meaning. Plaintiffs here did not have to guess whether the communications at issue were susceptible of interpretation as opposing the reelection of the governor.

Plaintiffs' separation of powers contention is based on a misstatement of what the campaign finance laws prohibit. They do not "prohibit any mention of the Governor's policies by candidates who are members of the legislature." Id,. pp. 23-24. As applied

to these candidates, the commission found only that their communications mentioning Governor Malloy by name violated their sworn undertaking to use public funds only to support their own election.

VI

The court finds that the plaintiffs are aggrieved by the commission's finding that they violated various of the election laws and regulations and its imposition of civil penalties on them.

The court finds further, however, that the plaintiffs have failed to demonstrate beyond a reasonable doubt that the challenged statute and regulations are unconstitutional on any of the grounds asserted by the plaintiffs.

To the contrary, this court finds that the voluntary decision to accept public funds to finance their campaigns for reelection, along with the condition that those funds not be used to promote another candidate's election, did not burden the plaintiff's First Amendment rights.

The court finds further that substantial rights of the plaintiffs have not been prejudiced on any of the grounds listed in § 4-183 (j).

Accordingly, the decision of the commission is AFFIRMED.

BY THE COURT

Joseph M. Shortall
Judge Trial Referee